

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

UNITED STATES OF AMERICA,

Plaintiff,

v.

**CRIMINAL ACTION NO.: 3:21-CR-49-2
(Chief Judge Groh)**

DIANA TOEBBE,

Defendant.

**AMENDED SUPPLEMENTAL MEMORANDUM IN SUPPORT
OF BELOW-GUIDELINES, VARIANT SENTENCE¹**

COMES NOW the Defendant, Diana Toebe, and submits this supplemental memorandum in support of her request for the Court to accept the parties' Fed. R. Crim. P. 11(c)(1)(C) plea agreement and sentence her to a term of thirty-six months imprisonment for her conviction in the above-captioned case.

A sentence of thirty-six months would be consistent with, and in some cases greater than, sentences imposed for other accomplices, as well as even some principle offenders.

Although the statutes charged in the following list of examples may not be the same as the statute the government chose to lodge against Mrs. Toebe in this case, the conduct of these individuals amounts to the same type of offense – that is these individuals provided, attempted to provide, or assisted in providing, classified

¹ This Supplemental Memorandum is amended to correct two typographical errors: one on page 13 (4.9 instead of .49); and one in footnote 27 (now footnote 28) to cite page 51 instead of 45.

information to an agent of a foreign government, generally for financial gain. The cases, which are divided into two categories: principal offenders; and accomplices, support for the conclusion that a sentence of 36 months is appropriate for Mrs. Toebbe, as an accomplice.

PRINCIPALS

Case name/no./district	Sent. year	Trial/plea	Desc. of Conduct	Sentence	Notes
Hassan Abu-Jihaad 3:07cr57 (D.Conn.)	2008	Trial	U.S. Navy signalman provided classified information about the upcoming movements of his battle group to an alleged terrorism support cell in London	120 months ²	
Michael Hahn Allen (UCMJ)	1987	Trial	Retired Navy Senior Chief Radioman turned civilian clerk passed classified information to Philippine intelligence officers “to promote his local business interests which included a used car dealership, a bar, and a cockfighting ring.”	96 Months	Military Jury Sentencing ³
Joseph Garfield Brown (E.D. Va.)	1993	Plea	Former US airman and martial arts instructor obtained classified CIA documents on Iraqi terrorist activities during the Persian Gulf War and assassination plans by a Philippine insurgent group from martial arts student and CIA secretary, Virginia Jean Baynes. Provided these	72 months ⁴	

² See U.S. Dep’t of Justice Press Release, *United States v. Abu-Jihaad*, 3:07CR57 (MRK) (available at <https://www.justice.gov/usao-ct/us-v-hassan-abu-jihaad>).

³ Defense Personnel Security Research Center, *Espionage Cases 1975-2004* at 1 (Nov. 2004) (available at <https://www.hsdl.org/?view&did=482512>)(hereinafter “*Espionage Cases 1975-2004 Report*”).

⁴ See *id.* at 5.

			documents to an official with the Philippine government with the hope of receiving money.		
John Douglas Charlton 2:95cr460 (C.D. Cal.)	1996	Plea	Retired Lockheed Corporation engineer attempted to sell highly classified information on the U.S. Navy's anti-submarine program to an undercover agent posing as a foreign government representative.	24 months	A search of his residence revealed a cache of illegal guns and several classified documents outlining US defense projects. ⁵
Allen John Davies 3:86cr01003 (N.D. Cal.)	1987		Former Air Force Sergeant attempted to relay secret information about Warsaw Pact military preparedness to an undercover agent he thought was a Soviet agent.	60 months	Government requested a 120-month sentence. ⁶
James Wilbur Fondren, Jr. 1:09cr263 (E.D. Va.)	2010	Jury Trial	Drafted opinion papers on international relations from classified information he learned on his job, in exchange for compensation by a foreign national who Fondren knew maintained a close relationship with a Chinese official.	36 months ⁷	Not guilty on 3 of 6 charges ⁸
Ronald Dean Graf (UCMJ)	1989	Unclear	Along with co-defendant, delivered \$150,000 worth of sensitive and classified aircraft parts and technical manuals to an undercover law enforcement agent they believed was a foreign government representative.	60 months ⁹	

⁵ See *id.* at 7.

⁶ See Associated Press, *Ex-Air Force Sergeant Gets 5 Years for Spying* (Aug. 28, 1987) (available at <https://www.nytimes.com/1987/08/28/us/ex-air-force-sergeant-gets-5-years-for-spying.html>).

⁷ See U.S. Dep't of Justice Press Release, Defense Department Official Sentenced to 36 Months for Espionage, False Statement Charges (Jan. 22, 2010)(available at <https://www.justice.gov/opa/pr/defense-department-official-sentenced-36-months-espionage-false-statement-charges>)

⁸ See *United States v. Fondren*, 1:09cr263, *Verdict*, ECF No. 91 (Sept. 25, 2009)

⁹ See *Espionage Cases 1975-2004* Report at 25-26.

Douglas F. Groat 1:98cr109 (D.D.C.)	1998	plea	A former CIA covert officer for 16 years, Groat contacted two foreign governments to market his services, providing his knowledge to foreign governments. Then he demanded \$1 million from the CIA “for not disclosing to foreign governments how the United States intercepts their communications.”	60 months ¹⁰	
Ron Rockwell Hansen 1:06cr57 (D. Utah)	2019	plea	U.S. Army Warrant Officer with a background in signals intelligence and human intelligence who spoke Mandarin-Chinese and Russian, retired to work for the DIA in 2006. Received hundreds of thousands of dollars in exchange for providing Chinese intelligence agents with classified information. Arrested with classified information in his possession at the airport while attempting to board a flight to China.	120 months ¹¹	
Randy Miles Jeffries (D.D.C.)	1986	Plea	“offer[ed] to sell an undercover FBI agent, posing as a Soviet operative named ‘Vlad,’ copies of three classified documents for	36 months ¹³	Accomplice who received classified documents and drove Jeffries on one of his trips to

¹⁰ Bill Miller and Walter Pincus, *Ex-CIA Agent Given 5 Years in Extortion Case*, The Washington Post (Sept. 26, 1998) (available at <https://www.washingtonpost.com/archive/politics/1998/09/26/ex-cia-agent-given-5-years-in-extortion-case/e6323eaf-c214-4143-953d-ccd406668599/>)

¹¹ See U.S. Dep’t. of Justice Press Release, *Former Intelligence Officer Convicted of Attempted Espionage Sentenced to 10 Years in Federal Prison* (Sept. 24, 2019)(available at <https://www.justice.gov/opa/pr/former-intelligence-officer-convicted-attempted-espionage-sentenced-10-years-federal-prison>)

¹³ See Katherine L. Herbig, Ph.D., *The Expanding Spectrum of Espionage by Americans, 1947-2015*, PERSEREC Technical Report 17-10 at 16 (Aug. 2017) (available at https://www.dhra.mil/Portals/52/Documents/perserec/reports/TR-17-10_The_Expanding_Spectrum_of_Espionage_by_Americans_1947_2015.pdf?ver=2018-02-14-073446-943) (hereinafter “Herbig Report”)

			\$5,000. One of the documents was a transcript, marked 'top secret,' of a House Armed Services subcommittee hearing about sensitive military communications programs. ¹²		the Soviet Military Office escaped charges, possibly on immunity grounds. ¹⁴ <i>See also infra</i> "ACCOMPLICES"
Ben-Ami Kadish 1:09cr1336 (S.D.N.Y.)	2009	Plea	Between 1980 and 1985 provided classified documents, including some relating to U.S. missile defense systems, to an Israeli agent.	No incarceration (\$50,000 fine)	Age 85 at the time of sentencing. Government did not charge the case for 23 years. Government did not seek jail time. ¹⁵
Robert Chaegun Kim 1:97cr117 (E.D.Va.)	1997	Plea	Navy civilian computer specialist, working at the Office of Naval Intelligence passed dozens of classified documents (including some Top Secret) to agents from his country of birth, South Korea. The documents included military assessments about North Korea and China and US intelligence assessments of South Korean government officials. Unclear whether motive was loyalty to his birth country or to address his considerable debt.	108 months ¹⁶	

¹² Ruth Marcus, *Jeffries Pleads Guilty to Spying Count*, The Washington Post (Jan. 24, 1986)(available at <https://www.washingtonpost.com/archive/politics/1986/01/24/jeffries-pleads-guilty-to-spying-count/08fb831e-8c79-4b90-ba19-03af9c95d4f0/>)

¹⁴ *See supra* n. 11.

¹⁵ *See* Christine Kearney, *US Man Who Gave Secrets to Israel Spared Prison*, Reuters (May 29, 2009) available at <https://www.reuters.com/article/us-usa-israel-spy/u-s-man-who-gave-secrets-to-israel-spared-prison-idUSTRE54S65H20090529>

¹⁶ *See* Brooke A. Masters, *VA Man Sentenced to 9 Years in Spy Case*, The Washington Post (July 12, 1997) (available at <https://www.washingtonpost.com/archive/local/1997/07/12/va-man-sentenced-to-9-years-in-spy-case/6adf232c-ea1c-434f-88a3-e8746616fd6a/>)

Subrahmanyam Kota 1:95cr10015 (D. Mass.)	1997	Plea	Was paid to steal classified information for an undercover FBI agent posing as a member of the Soviet KGB. ¹⁷	12 months of home detention ¹⁸	
Peter Lee 2:97cr01181 (C.D. Cal.)	1998	Plea	Scientist who provided classified DoE information to Chinese scientists	12 months in halfway house (60 months incarceration suspended) ¹⁹	
Ronald N. Montaperto 1:06cr00257 (E.D. Va.)	2006	Plea	Former Defense Intelligence Agency analyst held classified documents and passed Top Secret ²⁰ information to Chinese intelligence officials. Motive unclear ²⁰	3 months incarceration, 3 months home confinement ²¹	
Roy Lynn Oakley 3:07cr00088 (E.D. Tenn.)	2009	Pled Guilty the day his trial was set to begin	Formerly employed as a laborer and security escort at a DOE facility, he stole parts of uranium enrichment equipment, classified as restricted under the Atomic Energy Act, and tried to sell them for \$200,000 to an undercover agent posing as	72 months ²²	

¹⁷ See Tim Weiner, *Spies Can't Even Trust the Other Side Anymore*, The New York Times (Nov. 12, 1996) available at <https://www.nytimes.com/1996/11/12/world/spies-can-t-even-trust-the-other-side-anymore.html>

¹⁸ See *United States v. Kota*, 1:95-cr-10015, ECF No. 444, 445 (Jan. 13, 1995).

¹⁹ See Hearings before the Senate Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary United States Senate, *The Peter Lee Case*, 106th Congress, Second Session, (2000)(available at <https://www.govinfo.gov/content/pkg/CHRG-106shrg73205/html/CHRG-106shrg73205.htm>); *Espionage Cases 1975-2004* Report at 28.

²⁰ See The Washington Times, *Ex-DIA Analyst Admits Passing Secrets to China* (June 23, 2006)(available at <https://www.washingtontimes.com/news/2006/jun/23/20060623-120347-7268r/>).

²¹ See *United States v. Montaperto*, 1:06-cr-00257, ECF No. 23 (Sept. 12, 2006).

²² See U.S. Dep't of Justice Press Release, *Former Oak Ridge Complex Employee Sentenced to Six Years in Prison for Attempting to Sell Restricted Uranium Enrichment Equipment* (June 18, 2009) (available at <https://archives.fbi.gov/archives/knoxville/press-releases/2009/kx061809.htm>).

			an agent of a foreign government.		
Jeffrey Loring Pickering (UCMJ)	1983	Plea	Stole classified material from USS Fanning. Expressed an interest in the KGB and advised of fantasizing about espionage. Admitted mailing a five-page Secret document to the Soviet Embassy, Washington, DC, along with a typed letter offering additional classified material to the Soviet Union.	60 months at hard labor, forfeiture of \$400 per month for 60 months, reduction to E-1 and a bad conduct discharge ²³	
Sharon Marie Scranage 1:85cr155 (E.D.Va.)	1985	Plea	CIA clerk who provided classified information to the Ghanaian government.	60 months, later reduced to 24 months ²⁴	“Reagan Administration officials said today that they believed at least one Central Intelligence Agency informant in Ghana was murdered after his identity was disclosed by an agency employee charged with espionage.” ²⁵
Phillip Tyler Seldon 1:96cr305 (E.D.Va.)	1996	Plea	Passed classified documents to a Salvadoran air force officer while on active military duty in El Salvador as a US Army captain. Claimed to have thought the	24 months ²⁶	

²³ See Norman Polmar and Thomas B. Allen, *The Decade of the Spy* (Volume 3) at 278-280 (1989)(available at <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB407/docs/EBB-PollardDoc14.pdf>)(hereinafter “Polmar Report”).

²⁴ See (b)(3)(c), CIA, Ghana, and the (b)(1), Vol. 34 at 36 ((Fall 1990)(available at https://www.cia.gov/readingroom/docs/DOC_0000624354.pdf)(hereinafter “CIA Report”).

²⁵ Stephen Engelberg, *Officials Think Spying Led to Death of CIA Informant in Ghana*, The New York Times (July 13, 1985)(available at <https://www.nytimes.com/1985/07/13/us/officials-think-spying-led-to-death-of-cia-informant-in-ghana.html>).

²⁶ See *Espionage Cases 1975-2004* Report at 42.

			Salvadoran officer had the appropriate clearances.		
Bryan Underwood 1:11cr261 (D.D.C.)	2013	Plea	Former civilian guard at a U.S. Consulate compound under construction in China collected classified information on the consulate including photos, surveillance camera diagrams, and schematics with security system upgrades. Attempted multiple times to engage officials from the Chinese government to sell his classified information, but was unsuccessful at getting a response.	108 months	“After initially being arraigned ... Underwood was released on his personal recognizance, with certain conditions, including staying within the Washington, D.C. metropolitan area and returning to court for a status hearing Instead of returning to court as promised, Underwood purchased a bicycle, racks, panniers, helmet and multiple energy snack bars. He left a fake suicide note at his hotel room in Springfield, Va. Then, alive and well, he pedaled west out of Springfield and eventually boarded a bus in Wytheville, Va., under a false name. He was arrested on Sept. 24, 2011 in a hotel room in Los Angeles, with over \$10,000 in cash and 80,000 Japanese yen.” ²⁷

²⁷ U.S. Dep’t of Justice Press Release *Former U.S. Consulate Guard Sentenced to Nine Years in Prison for Attempting to Communicate National Defense Information to China* (Mar. 5, 2013)(available at <https://www.justice.gov/opa/pr/former-us-consulate-guard-sentenced-nine-years-prison-attempting-communicate-national-defense>).

Ronald Craig Wolf 3:89cr00120 (N.D. Tx.)	1990	Plea	Former Air Force pilot who flew intelligence missions. Passed classified information on Top Secret signals intelligence to an undercover agent posing as a representative of the Soviet Union “for monetary gain and to get revenge for his treatment by the United States government.”	120 months ²⁸	
Jay Wolff (jurisdiction unknown)	1984	Plea	Former Navy enlisted man offered to sell classified information dealing with US weapons systems aboard a US Navy vessel to an undercover agent.	60 months ²⁹	

ACCOMPLICES

Case name/no./district	Sent. year	Trial/plea	Desc. of Conduct	Sentence	Notes
Rosario Ames 1:94mj00104 (E.D. Va.)	1994	Plea	Aided and abetted her husband’s espionage. Husband was Aldrich Ames, a 31-year veteran of the CIA who spied for the Russians for 9 years and who has been described as “the most notorious and destructive spy in CIA history.” He was sentenced to life in prison. ³⁰ Mrs. Ames’ statement to the Court stated that she “provided advice and support” for her husband’s spying for the Soviet Union and then Russia. ³¹	63 months	Aldrich Ames admitted that was paid more than \$2.5 million, compromised dozens of CIA operations and exposed numerous foreigners who were spying for the CIA. The government says at least 10 were executed. ³² Mrs. Ames’ house was bugged. Evidence from this surveillance showed that “[o]n one mission she told him, ‘I hope you didn’t screw it up.’ On another, she told him that she hoped a lost

²⁸ *Espionage Cases 1975-2004* Report at 51.

²⁹ *See id.* at 51.

³⁰ Sally Quinn, *The Terrible Secret of Rosario Ames*, The Washington Post (Oct. 19, 1994)(available at <https://www.washingtonpost.com/archive/lifestyle/1994/10/19/the-terrible-secret-of-rosario-ames/00958966-8ae4-4071-a1a2-2710fe20209b/>)

³¹ Michael J. Sniffen, *Rosario Ames Sentences to 63 Months in Prison in Spy Case*, Associated Press (Oct. 21, 1994)(available at <https://apnews.com/article/b855e1cfacdaf9e6fe5d151dd2c0a52a>)

³² *See id.*

					<p>suitcase didn't contain "anything that shouldn't have been {there}." She warned him about the weather, and suggested he send a message to the Russians before it got bad. Another time she suggested the possibility that the house was bugged. And in one instance she drove with him when he went to a site to check a signal. Once she advised him that he should be 'more imaginative' in carrying packages back to the United States." A letter that Aldrich Ames had composed to the Russians was found in his home and it and said "My wife has accomodated {sic} herself to understanding what I am doing in a very supportive way."³³</p> <p>At sentencing prosecutors said that "in mid-1992 after learning the source of her money she went with her husband to New York and happily spent \$6,000 in KGB money in one weekend," and that greed motivated her.³⁴</p>
Virginia Jean Baynes 1:92cr226 (E.D.Va.)	1992	Plea	CIA secretary who provided classified CIA documents on Iraqi terrorist activities during the Persian Gulf War and assassination plans by a Philippine insurgent group to her martial arts instructor, Joseph Garfield Brown to assist him in his espionage activity with the Philippine government.	41 months ³⁵	
Marjorie Mascheroni	2014	Plea	Worked at the Dept. of Energy with access to classified	12 months	

³³ *Supra* n. 29.

³⁴ *Supra* n. 30.

³⁵ *See Espionage Cases 1975-2004 Report* at 5-6.

1:10cr2626 (D.N.M.)			information. Assisted her husband, who also worked at the DoE, in providing classified information to individuals they believed were agents of a foreign government, but were actually undercover FBI agent. Edited her husband's written documents and occasionally accompanied him on dead drops and face-to-face meetings. ³⁶	and one day ³⁷	
Gwendolyn Myers 1:09cr00150 (D.D.C.)	2010	Plea	Together with her husband, who held a position involving classified information with the State Department, provided classified information to Cuba for 30 years, beginning in 1979. In 2009, the FBI initiated an undercover operation and four meetings with both Myers and her husband. Myers was an active participant, processing the classified documents that her husband brought home for delivery to the Cuban agent. ³⁸	81 months ³⁹	
Nathaniel Nicholson 3:09cr40 (D. Or.)	2010	Plea	Enlisted by his father, a former CIA official already imprisoned for espionage, to continue spying by providing the Russian government with information contained in notes from his father.	Five years probation ⁴⁰	
Anne Henderson Pollard	1986	Plea	Wife of Jonathan Jay Pollard. Assisted her husband who	60 months	Gave a <i>60 Minutes</i> interview prior to sentencing hearing in

³⁶ FBI, *Former Los Alamos Lab Workers Sentenced* (Feb. 5, 2015)(available at <https://www.fbi.gov/news/stories/former-los-alamos-lab-workers-sentenced>)

³⁷ See *United States v. Mascheroni*, 1:10-cr-2626, ECF No. 538 (Sept 29, 2014).

³⁸ See *United States v. Myers*, Case No. 1:09-cr-00150, *Statement of Offense*, ECF No. 51 at 3-12 (Nov. 20, 2009).

³⁹ See *id.*, *Judgment*, ECF No. 69 (Aug. 2, 2010).

⁴⁰ Drew Kann, *How a CIA Traitor Turned His Son Into a Russian Spy*, CNN (Sept. 2017)(available at <https://www.cnn.com/interactive/2017/09/us/declassified-book-excerpt/#:~:text=Nathan%20avoided%20prison%2C%20but%20was,serving%20for%20his%20previous%20crimes>)

			was selling classified material to an Israeli intelligence unit. ⁴¹ Jonathan Pollard was sentenced to life imprisonment and released on parole after 30 years. ⁴²		which she stated, “I feel my husband and I did what we were expected to do, and what our moral obligation was as Jews, what our moral obligation was as human beings, and I have no regrets about that.” ⁴³
Kevin Quander			Received classified information from Randy Miles Jeffries for “safekeeping,” and “destroyed them shortly before Jeffries’ arrest because he felt ‘uneasy about the situation....’” Drove Jeffries on one of his trips to the Soviet Military Office. ⁴⁴	Not charged	Alleged to have “received immunity from prosecution in return for testifying before a federal grand jury investigating the case” ⁴⁵
Barbara Walker			Ex-wife of notorious soviet spy, John A. Walker Jr. Knew about his espionage activities while they were married and “covering them up ’became a way of life.’” ⁴⁶ Eventually she and John Walker divorced and she turned him in. Said she sent John Walker a warning that she had turned him in so he could flee to Russia.	Not charged	Reported that she was granted immunity in exchange for testimony ⁴⁷

⁴¹ See Polmar Report at 278-280 (1989).

⁴² Peter Baker and Jodi Rudoren, Jonathan Pollard, *American Who Spied for Israel, Released After 30 Years*, New York Times (Nov. 20, 2015)(available at <https://www.nytimes.com/2015/11/21/world/jonathan-pollard-released.html>).

⁴³ Edwin Black, *Why Jonathan Pollard is Still in Prison*, Forward (June 28, 2002) (available at <https://forward.com/news/318100/why-jonathan-pollard-is-still-in-prison/>).

⁴⁴ *Supra* n. 11.

⁴⁵ *Id.*

⁴⁶ Jane Perlez, *Spy Suspect’s Ex-Wife Tells of Warning Him so He Could Flee to Soviet*, The New York Times (June 21, 1985) available at <https://www.nytimes.com/1985/06/21/us/spy-suspect-s-ex-wife-tells-of-warning-him-so-he-could-flee-to-soviet.html>

⁴⁷ See Laura Castaneda, *Barbara Walker Testifies in Whitworth Spy Trial*, Associated Press (May 13, 1986)(available at <https://apnews.com/article/b967951729d8545bafd9f4b4bb5757bd>)

Additionally, according to the Department of Defense's own research, 42% of all espionage offenders between 1990 and 2015 were sentenced to a period of incarceration between .1 and 4.9 years:⁴⁸

Table 8
Consequences of Espionage

Characteristics	1947-1979		1980-1989		1990-2015	
	<i>n=67</i> <i>persons</i>	%	<i>n=72</i> <i>persons</i>	%	<i>n=66</i> <i>persons</i>	%
Initial prison sentence, in years						
None	15	22	6	8	3	4
.1 – 4.9 years	8	12	15	21	28	42
5 – 9.9 years	10	15	14	20	13	20
10 – 19.9 years	13	19	14	20	11	17
20 – 29.9 years	4	6	10	14	2	3
30 – 39.9 years	4	6	6	8	5	8
40 years	2	3	1	1	0	0
Life in prison	11	17	6	8	4	6

The vast majority of the cases represented in this chart were classic espionage, not “leaks” (to the press), or other types of espionage:⁴⁹

⁴⁸ Herbig Report at 40.

⁴⁹ Herbig Report at 62.

Table 12
Types of Espionage by Americans

Characteristics	1947-1979	1980-1989	1990-2015
	<i>n=68</i>	<i>n=74</i>	<i>n=67</i>
Number of Persons Coded as One Type of Espionage			
Classic	56	68	42
Foreign Agent	3	1	11
Export Control	0	1	4
Number of Persons Coded as Two Types of Espionage			
Classic + Leak	0	0	7 + Snowden ²⁸
Classic + Foreign Agent	8	2	2
Classic + Export Control	0	0	1
Economic + Foreign Agent	1	0	0
Export Control + Foreign Agent	0	2	0

Thus, in keeping with these cases and statistics, and pursuant to the §3553(a) factors set forth in her original sentencing memorandum, a sentence of thirty-six months incarceration for Mrs. Toebe is sufficient, but not greater than necessary to achieve the goals of sentencing.

DEFENDANT
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CERTIFICATE OF SERVICE

I, Barry P. Beck, counsel for Defendant, hereby certify that on the 31st day of October, 2022, the foregoing **AMENDED SUPPLEMENTAL MEMORANDUM IN SUPPORT OF BELOW-GUIDELINES, VARIANT SENTENCE** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Barry P. Beck
Barry P. Beck